IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error,* *vs.* SPOKANE INTERSTATE FAIR ASSOCIATION, *Defendant in Error.*	No. 4639

Error to the United States District Court of the Eastern District of Washington, Northern Division

Petition for Rehearing

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Spokane, Washington
Attorneys for Defendant in Error.

EMPIRE PRINTING CO., SPOKANE

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Defendant in Error petitions the Court for a rehearing upon the question of law decided; if this should be denied, alternatively it prays a modification of the opinion.

1. The Court will take judicial notice that most country banks and most other safe owners carry burglary insurance. This insurance is written for a year. It is sometimes renewed, as seems to be contemplated by the policy in suit in this case, by a certificate of renewal, thus making the policy in force for another period. More often it is done, however, by the issuance of a new policy. Suppose a safe owner had carried with the Plaintiff in Error burglary insurance, under a policy identical in its terms with the one in suit, for the year 1924, terminating at midnight on December 31st of that year; that either a new policy was written commencing at the moment of the expiration of the old and covering another year or that a new contract had been made by the issuance of a certificate of renewal. In both cases the legal effect would be identical; that is, one contract expiring at midnight on December 31st and the other commencing at that same moment. Now suppose further that it were established in a suit against Plaintiff in Error for a loss by burglary that the burglar had drilled the safe during the night of December 31st, completely finishing the drilling before midnight, and that after midnight he had extracted the contents of the safe. Under the doctrine declared by the opinion

in this case the safe owner would be remediless. He could not recover under the 1924 policy because there had been no loss during the life of that policy; he could not recover under the 1925 policy because the force and violence applied to the safe and the consequent visible marks thereon were exerted before midnight, before the 1925 policy was in effect. We put this question to the Court: In such a state of facts would not the Court, looking at the language of the policy, say there was at least reasonable doubt whether the parties to the two contracts intended, or did not intend, that the insured should be protected in such a contingency? We say the law is that if there were reasonable doubt upon the question, that doubt must be resolved in favor of the insured. It is true the opinion in this case recognizes the rule. We respectfully submit, however, that it does not make a just application of the rule. We ask the Court to consider the case of *Mutual Insurance Co. v. Hurni Co.,* 263 U. S., 167. In that case a policy was actually issued in September. It was antedated to August of the same year. The question before the court was the two years incontestability clause. The words to be construed were "from its date of issue." The Court say (p. 175):

> "While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual

> execution of the policy or the time of its delivery but to the date of issue as specified in the policy itself."

and at page 176 the Court say again:

> "It was within the power of the Insurance Company if it meant otherwise, to say so in plain terms. Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it."

Now in the case we have supposed, the Court would turn to the language of the two policies, the one of 1924 and the one for 1925, and would there find written in paragraph four under the head of "Limits of Indemnity" this language: "This agreement shall only apply to loss or damage as aforesaid occurring within the policy period. * * *." May it not justly be said that that language, by its very terms, excludes the application of the force and violence within the policy period? Mark you, the attention of the writer of the policy, in paragraph four, under the head of "Limits of Indemnity," is drawn to the very question. He there undertakes to state precisely what must occur within the policy period. He says the *loss* must occur; not that the force and violence must have been applied, not that the visible marks must have been left within the policy period, but, in express terms, that the *loss* must have occurred within that period, thereby of necessity excluding everything else. At the very least, it seems to us, the Court, upon further con-

sideration, must say that those words leave the question as to what is meant open, in the language of the case from the Supreme Court above cited, to "reasonable doubt." It seems to us too plain for argument that, in the language of the same Court, "it was within the power of the Insurance Company, if it meant otherwise, to say so in plain terms"; and the conclusion follows in this case, as it followed in that, that "not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it." We have put the suppositious case to bring strikingly to the forefront the evil which would result from the ruling in this case. In the supposed case, it seems clear to a demonstration that the insurance company did not intend and the insured did not suppose he was taking a policy, and then another, and that notwithstanding he was still uncovered for a loss coming plainly within the terms of one or the other.

In the case we have imagined, the burglary is admitted, the loss is admitted, and yet the insured is deprived of the protection which he supposed he had and which presumably the Insurance Company intended to give him. By the construction of the policy following the opinion in this case, the insured fell between the horns of the altar, between the 1924 and the 1925 policy. So here. It is not disputed that the safe was burglarized; it is not

disputed that its contents were abstracted; the amount is not in dispute. Every single element is present in substance that under the terms of the policy was necessary to be present to entitle the insured to a recovery. The safe had been entered by violence; the marks of violence are upon the door. Pray, how does it stand with justice and the rule of construction that we are contending for to say, forsooth, that because violence was applied days, or hours, or minutes, or seconds, before the period of the life of the policy, that therefore, and for that reason only, the insured cannot recover? We do respectfully urge upon the Court that it permit a reargument of this question to the end that it may have further consideration.

2. If the foregoing petition be denied, we then pray the Court to modify the language of the opinion. It is stated in the opinion that it was at no time claimed that the safe was opened or entered by actual force and violence during the policy period. In this statement the Court is in error as a mere matter of record. Paragraph four of the complaint alleges that (p. 3, Tr.) during the night of September 4, 1924, or early morning hours of September 5, an entry was made and the burglary completed. The same paragraph then alleges that such entry was effected into the vault and safe by actual force and violence, etc. Plainly, the complaint alleges the entry and the force of violence to have been made during the night of September

4-5. There is not a word, a line, or a syllable in the evidence in the case tending to depart from that allegation of the complaint. The opinion, then, goes on to say that the case was tried and submitted to the jury upon the theory that some time before the opening of the fair and the date of the policy the force and violence were applied, and the actual entry was thereafter made. The writer of this petition tried the case below. He is quite in a position to say that at no time up until the court charged the jury was the case tried upon the theory suggested by the opinion. The evidence of the facts as claimed by plaintiff was introduced. Defendant impliedly conceded the sufficiency of that evidence to make a case because he did not challenge its sufficiency, but after plaintiff had rested went at once to his own testimony. When the evidence was all in, the defendant challenged its sufficiency and plaintiff moved to take from the consideration of the jury certain affirmative defenses pleaded by defendant. Defendant's motion was overruled and plaintiff's motions were granted. Up to this stage of the case, plaintiff was prepared to go to the jury upon the question that the force and violence was applied and the consequent marks made during the policy period. Of course there was no direct evidence upon the question. No one saw or pretended to have seen any part of the burglary. It was a matter of inference from the evidence in the case which the jury, and the jury alone, were competent to draw. There were many powerful and cogent

reasons to suppose that the safe was drilled during the life of the policy, and counsel are prepared, if necessary, now to go to the jury upon that question. It is not necessary, we suppose, to state those reasons in this petition. We do not know that on the future trial of this case the statements of the opinion to which we have referred would bind either the lower court or the plaintiff, or, in the event of another appeal, the appellate court. Indeed, the rule is well established by the authorities that no ruling made by the appellate court upon a question of fact binds the trial court or the appellate court itself on a second trial and a second appeal. This upon the theory that the case, when reversed, is tried at large; that the jury on the second trial may take the same view of the evidence that the jury upon the first trial took, or it may take a totally different one. So, likewise, may the trial court and the appellate court. We refer to one or two cases: Williams et al. v. Miles et al. (Neb.), 127 N. W., 905; Wallace et al. v. Sisson et al. (Calif.), 45 Pac., 1000; Northern Assurance Co. v. Grand View Ins. Ass'n., 203 U. S., 106. And we suppose likewise that if upon the first trial the plaintiff had taken the view of the evidence imputed to it by this opinion it would still be open to its counsel to take a different view of the evidence and to urge the second view upon the second jury. The trial court might, however, feel itself bound by the declarations of the opinion and might conceivably feel compelled to give them some effect. We

think that the language of the opinion in these respects should be modified. It is true, as the opinion states, that it was admitted on the argument before this Court that the force and violence were employed before the date of the insurance policy. Well, now, when the court charged the jury that it was immaterial whether the force and violence were employed before or after the date of the policy, all questions as to when that force and violence were used ceased to be material. From that time on the plaintiff was concerned only with the questions that force and violence were employed and that entry into the safe was effected and the money abstracted during the life of the policy. But to say that when the court took that view of the law, upon our motion of course, that the whole case had been from the beginning tried upon that theory, is quite to mistake the effect of the record. And of course when counsel, arguing in this court, made the concession stated in the opinion he made it because it was immaterial to this hearing when the force and violence was actually applied. The jury had not been invited to pass upon that question. To sustain the judgment it was necessary to sustain the view of the law taken by the trial court, and therefore counsel, without quibble, admitted the facts to be so. But assuredly, your Honors, it was not necessary that counsel should say, in making this admission, "We make it for the purpose of the record as it now stands, and not otherwise." Assuredly, your

Honors, this is implied in the very circumstance of the case as it stood when argued in this Court.

Respectfully submitted,

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Attorneys for Defendant in Error.

We hereby certify that in our judgment the above petition for rehearing is well founded, and that it is not introduced for delay.

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